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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 380

ALFRED A. MAURER AND MARCUS W. MYERS,
TRADING AS MAURER & MYERS AUTO CONVOY,
Appellants,

vs.

WILLIAM J. HAMILTON, JR., SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT AS TO JURISDICTION.

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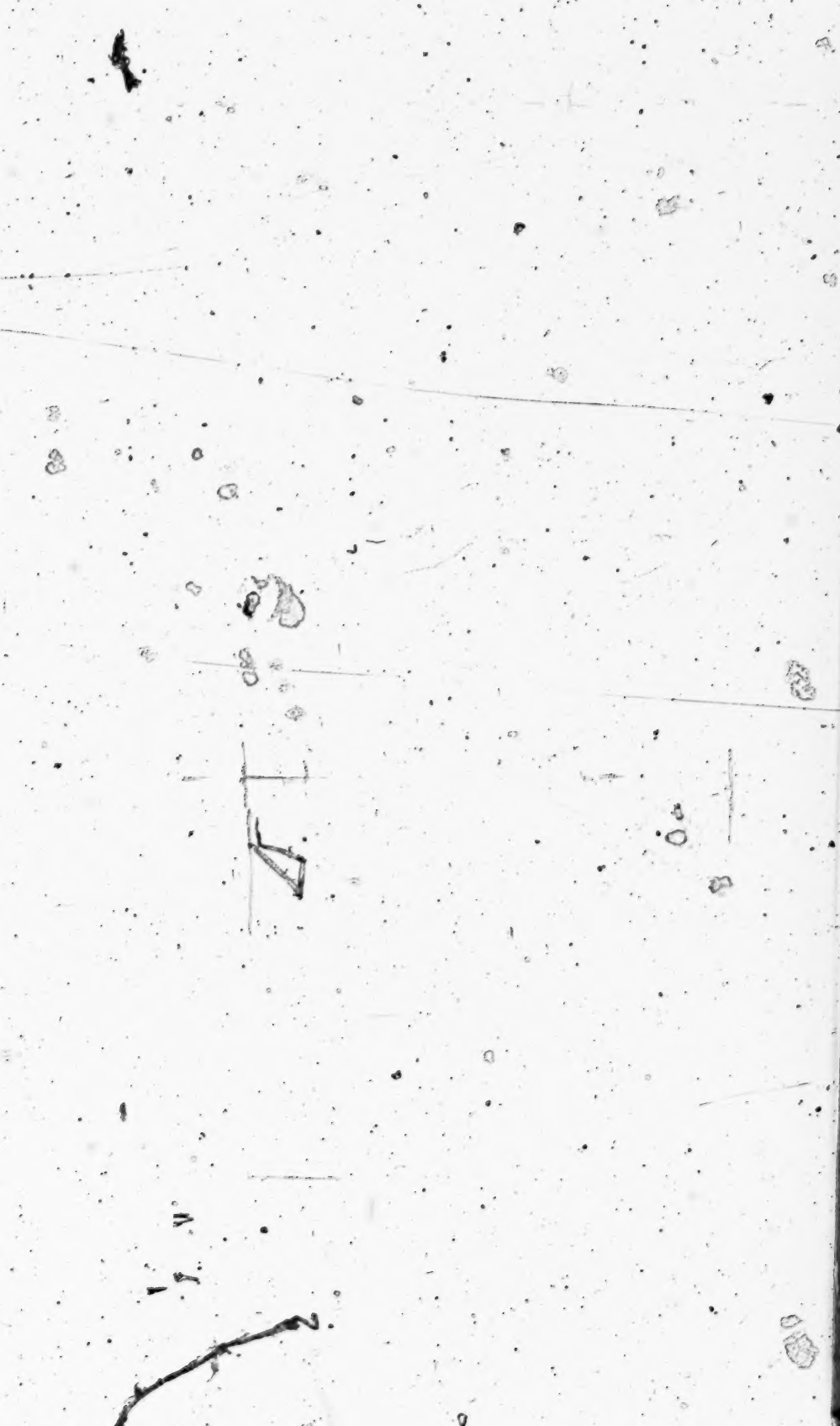

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WILLIAM J. HAMILTON, JR., SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA; LYNN G. ADAMS, COMMISSIONER OF THE PENNSYLVANIA MOTOR POLICE; AND CLAUDE T. RENO, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA.

APPELLANTS' JURISDICTIONAL STATEMENT.

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the following statement is herewith presented.

(a) Statutory Provisions Sustaining Jurisdiction.

Appellants contend that a right of appeal in this proceeding is conferred upon them by Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 344). The said section expressly confers the right of appeal to the Supreme Court of the United States from "a

final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had * * * where * * * is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity * * *" Under the provisions of said section the appellants would be entitled to a writ of error under the laws as they existed prior to January 31, 1928, at which time appeal was substituted for writ of error (28 U. S. C. A. 861a, 861b).

(b) The Statute of Pennsylvania, the Validity of Which is Involved, and the Regulations in Pursuance Thereof Pertaining to the Situation.

The appeal involves the validity of Section 1033 (c) of the Act of June 29, 1937, P. L. 2329 (Act No. 447) of the General Assembly of the Commonwealth of Pennsylvania, which reads as follows:

> "No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle any part of which is above the cab of the carrier or over the head of the operator of such carrier vehicle."

Under the provisions of the said law, the said section became effective immediately upon the approval of the Governor on June 29, 1937. By the amendatory act of June 27, 1939, said section was amended, effective September 1, 1939, to read as follows:

> "No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle the weight of which is directly above the cab of the carrier vehicle or directly over the head of the operator of such carrier vehicle."

Even though the said amendment was not effective when the court's decision was filed and even though the parties

were not given opportunity to brief and argue this point, the court nevertheless held that the change in language meant nothing and did not change the effect or meaning of the section.

Appellants contend that the 1937 provision was superseded as to interstate commerce by the provisions of the Motor Carrier Act, 1935 (49 U. S. C. A. 304) and the orders and regulations of the Interstate Commerce Commission adopted in pursuance thereof and that the court had no right, power or authority to construe the 1939 amendment.

The precise section of the Motor Carrier Act, 1935, involved is Section 204, which reads as follows:

> "Sec. 204 (a) It shall be the duty of the Commission—
>
> "(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.
>
> "(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Pursuant to the powers conferred on the Interstate Commerce Commission in said Section 204, the Interstate Commerce Commission has adopted extensive safety regulations. On December 23, 1936, the Commission, following formal hearings and a full investigation, prescribed, at Ex Parte MC-4, extensive regulations pertaining to safety of operation and equipment of interstate motor carriers. Subse-

quently, following a formal hearing at which the Commonwealth of Pennsylvania appeared, Examiner R. W. Snow, of the Interstate Commerce Commission, recommended a finding that the use of motor vehicles in the transportation of automobiles which are so constructed that all or part of one of the automobiles being transported protrudes over the cab of the carrying vehicle is not unsafe. On March 11, 1939, the Interstate Commerce Commission, by Division 5, adopted an order reaching the same conclusion. A copy of the report of the Commission is attached to this statement.

(c) Date of Judgment and Appeal.

The judgment and decree of the Supreme Court of the Commonwealth of Pennsylvania to be reviewed was filed on July 3, 1939, and application for appeal to the Supreme Court of the United States was presented to the Chief Justice of the Supreme Court of Pennsylvania on July 15, 1939. He refused the said petition on July 21, 1939, and the application for appeal was presented to the Honorable Owen J. Roberts, Associate Justice of the Supreme Court of the United States, on August 16, 1939.

The case involves a request by the petitioners for an injunction against the enforcement of Section 1033 (c) above referred to. As stated in the opinion of the Pennsylvania Supreme Court "their operations are almost wholly in interstate commerce." The principal contentions of the plaintiffs were that the State act was superseded as to interstate commerce by the provisions of the Motor Carrier Act quoted above and by the actions of the Interstate Commerce Commission referred to, and further that Section 1033 (c) was not a proper exercise of the police power since the means provided there were arbitrary and unreasonable and have no reasonable and direct relationship to the public safety, and consequently the plaintiffs were deprived of their property without due process of law in violation of the Four-

teenth Amendment of the Constitution of the United States.

There are numerous precedents of the United States Supreme Court to the effect that where the State act is attacked on the basis that it conflicts with Federal action or is superseded thereby, an appeal lies to the United States Supreme Court. See, for example, *Dickinson* v. *Stiles*, 246 U. S. 631; 38 S. Ct. 415; 62 L. Ed. 908; *First National Bank of Guthrie Center* v. *Anderson*, 46 S. Ct. 135; 269 U. S. 341; 70 L. Ed. 295. A very recent precedent of an appeal on this basis is found in the decision of *H. P. Welch Co.* v. *State of New Hampshire*, 59 S. Ct. Rep. 438, in which the appellants contended that the enactment of the Motor Carrier Act had superseded the New Hampshire statute prescribing hours of service for drivers of motor vehicles. Other decisions sustaining the jurisdiction of the United States Supreme Court on appeal (or previous to January 31, 1928 on writ of error) are: *Pa. RR. Co.* v. *Public Service Commission of Pa.*, 250 U. S. 566; *Atlantic Coast Line RR. Co.* v. *Georgia*, 234 U. S. 280; *Napier* v. *Atlantic Coast Line RR. Co.*, 272 U. S. 605; *Texas & Pac. Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Kelly* v. *Washington*, 302 U. S. 1; *Sprouls* v. *Binford*, 286 U. S. 374; and *South Carolina State Highway Department* v. *Barnwell Bros. Inc.*, 303 U. S. 177.

Decisions upholding the jurisdiction of the United States Supreme Court on appeal (or previously on writ of error) on the basis that the State legislation deprives the appellants of their property without due process of law in violation of the Fourteenth Amendment of the United States Constitution are: *Northern Pac. R.R. Co.* v. *Public Works Department*, 268 U. S. 39; *Blue Field Improvement Co.* v. *Public Service Commission*, 262 U. S. 679; *Bell's Gap R. R. Co.* v. *Pa.*, 134 U. S. 232; *Pa. Coal Co.* v. *Mahon*, 260 U. S. 393, 43 S. Ct. 158; *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 46 S. Ct. 605; 47 A. L. R. 457; *Smith* v. *Cahoon*, 283 U. S. 553, 51 S. Ct. 582.

The plaintiffs in their original bill in equity contended *inter alia*, in paragraph 18 (a) that the enforcement of said Section 1033 (c) would "deprive the plaintiffs of their property and the use and enjoyment thereof without due process of law and without just compensation therefor, in violation of the provisions of the Constitutions of the United States of America and of the Commonwealth of Pennsylvania." This precise averment appears at page 7a of the record filed with the Supreme Court of Pennsylvania. Paragraph 18 (b) of said bill of complaint contended that the enactment of said section is not a proper exercise of the police power, for the reason that the provisions of said section are not reasonably related to the results sought to be attained and for other reasons. In paragraphs 18 (d) and (e), the plaintiff contended that the State law was unconstitutional since the State had no jurisdiction or right to legislate on this subject insofar as interstate commerce is concerned, and that said law constitutes an unreasonable and invalid burden on interstate commerce. These exact averments are as follows:

> "(d) The General Assembly of the Commonwealth of Pennsylvania had no right, authority, or jurisdiction to legislate on this subject insofar as interstate commerce is concerned.
>
> "(e) The said provision constitutes an unreasonable and invalid burden on interstate commerce."

Requests for conclusions of law similar to these contentions were filed with the chancellor who heard the case. These requests were overruled, and in its conclusions of law, the Court of Common Pleas of Dauphin County decided, *inter alia*, as follows:

> "1. The act here complained of, Section 1033 (c) of the Vehicle Code as amended by Act No. 447, approved June 29, 1937, P. L. 2329, is not unconstitutional as a deprivation of property without due process, but on the

contrary is a valid exercise of the police power of this Commonwealth.

"2. Section 1033 (c) is not unconstitutional as an unreasonable and invalid burden on interstate commerce, and does not discriminate against interstate commerce.

"3. Neither Congress, under the Motor Carrier Act of 1935, nor the Interstate Commerce Commission, has usurped the field of safety regulation of interstate motor carriers to such an extent as to remove the authority of the Pennsylvania Legislature to enact Section 1033 (c) affecting interstate commerce."

The plaintiffs (appellants herein) filed exceptions to the conclusions of law recited above and assigned said conclusions as error in their appeal to the Pennsylvania Supreme Court. Following the taking of the appeal to the Pennsylvania Supreme Court, the Interstate Commerce Commission instituted an investigation at Reopening of Ex Parte No. MC-4 to determine whether or not the transportation of automobiles which are so constructed that all or part of one of the automobiles being transported protrudes over the cab of the carrying vehicle is safe. Following a full hearing, at which counsel for the Commonwealth of Pennsylvania entered appearances and were given full opportunity to present evidence, the examiner recommended a conclusion that such transportation was not unsafe. Upon the filing of this report, the appellants herein petitioned the Supreme Court of Pennsylvania to remit the record in the appeal for the purpose of introducing into the record this report and developments subsequent thereto. The Pennsylvania Supreme Court refused the petition but entered the following order:

"Jany 3rd 1939. Petition to remit is refused, the petition to reopen the hearing before the Interstate Commerce Commission and the report of the examiner may be used by appellants at argument if they deem it material.

Per Curiam, C. J."

Subsequently the commission filed a report reaching the same conclusion as the examiner. A copy of the commission's report is attached to this statement. In pursuance of the order of the Pennsylvania Supreme Court on the petition to remit the record, counsel for the appellants printed the reports of the examiner and of the Interstate Commerce Commission in its paper books filed in the appeal and the effect of such orders on the State law was thoroughly argued by counsel for both sides. The Pennsylvania Supreme Court in its opinion, copy of which is attached hereto, considered the order and expressly stated that "in arriving at this conclusion we have not overlooked the report of the Interstate Commerce Commission * * *." The Court then concludes that the report "cannot be regarded as having a purpose to replace existing State law on the subject."

The opinion of the Pennsylvania Supreme Court also acknowledges that the applicants herein contended that the Pennsylvania act deprived them of the use of their property without due process of law, in violation of the Constitution of the United States. After considering the matter, the Court concluded, as indicated in the attached opinion, that the said act did not violate the due process clause of the Fourteenth Amendment.

In accordance with the provisions of Rule 12 of the Supreme Court of the United States, the applicants (appellants) append to this statement, copies of the opinion (adjudication) of the Court of Common Pleas of Dauphin County, the opinion of the Pennsylvania Supreme Court, and the order of the Interstate Commerce Commission, all of which have been referred to above.

McNees, Hollinger & Nurick,

(Signed) By Sterling G. McNees,

Attorneys for Appellants.

EXHIBIT "A".

(245)

IN THE SUPREME COURT OF PENNSYLVANIA.

Middle District.

No. 20.

May Term, 1939.

ALFRED A. MAURER AND MARCUS W. MYERS, TRADING AS MAURER & MYERS AUTO CONVOY,

Appellants,

vs.

J. GRIFFITH BOARDMAN, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA; P. W. FOOTE, COMMISSIONER OF THE PENNSYLVANIA MOTOR POLICE; AND CHARLES J. MARGIOTTI, ATTORNEY-GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA.

Appeal from the Decree of the Court of Common Pleas of Dauphin County, Sitting in Equity, at No. 1308 Equity Docket, 1937, No. 281 Commonwealth Docket, 1937.

OPINION OF THE COURT.

Filed July 3, 1939.

BARNES, J.

Plaintiffs seek to enjoin the enforcement of Section 1033 (c) which was added to the Vehicle Code by the Act of June 29, 1937, P. L. 2329, 2401. This act forbids the operation upon the highways of this Commonwealth of a vehicle carrying an automobile over the cab or head of the operator of the carrier vehicle. Its provisions became effective upon the approval of the act by the Governor on June 29, 1937, but the granting of a preliminary injunction in the court below has resulted in postponing the date of enforcement. The defendants are the Secretary of Revenue, the Commis-

sioner of the Pennsylvania Motor Police, and the Attorney-General, as the officers of the Commonwealth who are charged with the duty of administering and enforcing the provisions of the statute.

The act of 1937 added new sections to the Vehicle Code, one of which is designated as "Section 1033." The part thereof which is here challenged is subsection (c), reading, except for the penalty clause, as follows: "No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle."

It is admitted by defendants that they have instituted prosecutions under this Section in a number of cases within the state, and have taken steps to enforce the act against the plaintiffs, and generally throughout the Commonwealth. The plaintiffs, a partnership, have their principal place of business in Bloomsburg, Columbia County. The M. & G. Convoy, Inc., a New York corporation, having its office at Buffalo, filed a similar bill in equity for a restraining order against the defendants, and like action was taken by John G. Reeser, of Duncannon, Pennsylvania. All these parties are engaged principally in the business of transporting new automobiles upon tractors and trailers especially constructed for that purpose, and their operations are almost wholly in interstate commerce. A number of owners and operators of such motor equipment intervened in the proceeding instituted by the M. & G. Convoy, Inc., and thereafter the three cases were consolidated in the court below.

In conducting their operations as common carriers of automobiles, the plaintiffs use forty vehicles, twelve of which are owned by them, and twenty-eight are upon lease. Plaintiffs allege that this equipment has a replacement value of approximately $100,000. All but one of these vehicles are registered in Pennsylvania, and the registration fees for the year 1937 have been paid to the Department of Revenue of this state. Each vehicle is built to carry four automobiles, and is so constructed that a portion of one of the transported automobiles rests over the cab of the carrier

vehicle.* Plaintiffs further allege that they have built up an extensive transportation business, their gross receipts for 1936 being approximately $200,000, which affords regular employment to some seventy-eight persons.

Plaintiffs assert that the effect of the act in question will be to deprive them of the use of their property, because the removal of the car carried over the cab will take from the front wheels the weight required to afford traction to the carrier vehicle; that the vehicles cannot be remodeled to conform with the requirements of the act, so that a car will not be carried in that position. In consequence they say that it will be necessary for them to curtail, and possibly discontinue, their operations, as it is not feasible to reroute their traffic to avoid traveling through this state.

It is therefore averred that the prohibition contained in Section 1033 (c) of the Vehicle Code is unconstitutional, illegal and void for the following reasons: (1) it is not a valid exercise of the police power of the state, because the regulation is arbitrary and is not reasonably related to public safety; (2) it deprives plaintiffs of the use of their property without due process of law in violation of the Federal and State Constitutions, and also constitutes special legislation of the character forbidden by the Constitution of this Commonwealth; (3) that this state is without authority or jurisdiction to legislate upon the subject of interstate commerce upon its highways, because of the enactment by Congress of the Motor Carrier Act, 1935, and the issuance of regulations by the Interstate Commerce Commission pursuant thereto; (4) that the prohibition of the act constitutes an unreasonable and invalid burden upon interstate commerce, even in the absence of federal legislation upon the subject.

At the hearing in the court below there was evidence on behalf of the Commonwealth to prove that the operation of a truck-tractor with car over cab, is dangerous and unsafe to the operator thereof and to the traveling public; that the hazards of highway travel are materially increased by the use of these vehicles upon the roads of the Commonwealth,

* These vehicles are referred to as "truck-tractors."

as was shown by testimony establishing the following facts (a) The automobile over the cab raises the center of gravity of the vehicle, resulting in making its operation difficult particularly on the curves of the type to be found in Pennsylvania; (b) excess weight is placed upon the front wheels of the truck-tractor, thereby affecting detrimentally its steering, the action of its brakes, and throwing its headlights out of focus, to the danger of oncoming traffic; (c) the extension of the carried automobile and the vertical framework supporting it over the cab of the truck-tractor obstruct the vision of the operator, as well as that of drivers of overtaking vehicles; (d) overhead and lateral obstructions along the highway cause the truck-tractor to be operated upon the wrong side of the road, to avoid scratching and damage to the carried vehicle; (e) the chains used to anchor the automobile over the cab, and the supporting structure, are insufficient to resist the force transmitted in the event of collision, with the result that the automobile becomes detached and falls off the carrier vehicle.

Evidence was also produced at the hearing, of accidents in which this type of equipment was involved, from which it appeared that the transported automobile in such instances became dislodged and personal injuries and property damage resulted. The Commonwealth contended that the establishment, maintenance and control of its highways were within the police power of the state, in the exercise whereof it has the right to forbid the operation thereon of vehicles or equipment which were dangerous or unsafe to the traveling public; that the provisions of this Section were intended by the legislature solely as a safety measure.

Following the hearing, the findings of the Chancellor were filed, in which it was held that Section 1033 (c) is a valid exercise of the police power of the state, which the legislature not only had the power but was under a duty to enact, to provide for the public safety; that the carover the cab equipment, used by plaintiffs, is dangerous and unsafe when operated upon the highways of the state and that plaintiffs were not entitled to the injunctive relief which they sought. Thereupon the court en

tered a decree nisi dissolving the preliminary injunction, and dismissing the bill of complaint. Exceptions to the findings were dismissed by the court in banc, and from the final decree dismissing the bill the plaintiffs have appealed to this Court.

As a valid exercise of the police power of the state, this particular Section of the act cannot successfully be questioned, in view of the decisions of this Court and the decisions of the Supreme Court of the United States, which have broadly sustained that power. The state, as the owner of the highways, roads, streets and bridges of the Commonwealth (*Tranter* v. *Allegheny County Authority*, 316 Pa. 65, 74) may vacate them or make any regulation necessary for the protection of life, limb or property thereon. The plenary power of the legislature so to regulate the use of the highways of the Commonwealth is of ancient standing. The regulation may not, of course, capriciously or arbitrarily affect interstate commerce, discriminate against such traffic, or violate fundamental rights guaranteed by our own Constitution. See *Com.* v. *Funk* 323 Pa. 390, where it is said (p. 395): "It (the legislature) alone has the power to regulate the manner and circumstances under which automobiles may be operated upon the highways of the Commonwealth. This power is vested in the legislature, and is based not only upon its right to control and regulate the use of the highways, but is buttressed by the inherent police power of the state."

The control of its highways and the rights of the state to regulate the use of motor vehicles operated thereon, has been upheld by the Supreme Court of the United States: *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Hendrick v. Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Hodge Co.* v. *Cincinnati*, 284 U. S. 335; *South Carolina State Hwy. Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177. In *Hess* v. *Pawloski*, 274 U. S. 352, Mr. Justice Butler said (p. 356): "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part

of all residents and nonresidents alike, who use its highways."

While plaintiffs do not directly challenge the scope of the police power of the state, which the courts have thus expressly upheld, they do take exception to the exercise of that power by the act here in question as being arbitrary and unrelated to public safety.

In view of the convincing evidence on the part of defendants of the many dangers inseparably connected with this method of transporting automobiles, it seems to us the fact is conclusively established that the presence of a car over the cab of a truck-tractor is unsafe. The findings of the court below in this regard are fully supported by the testimony of witnesses well qualified by technical training to express an opinion upon the subject,* and by practical experience in the operation of such vehicles to testify to the dangers attending their use.** There is, therefore, no merit in the contention of plaintiffs that the provisions of the Section are arbitrary and not reasonably related to public safety, or that the car over cab carriage of automobiles is not a proper subject for legislative prohibition.

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*Among the witnesses called on behalf of defendants were Professor August Ulmann, Jr., a member of the faculty of the Towne Scientific School of the University of Pennsylvania, a mechanical engineer and physicist; and Dr. Henry F. King, an automotive engineer connected with the Massachusetts Institute of Technology, and also consulting engineer for some of the larger automobile companies. These witnesses, by calculations based upon actual measurements and study of the equipment used by plaintiffs, and by exhibits showing the formulae used in connection with the law of physics, whereby the center of gravity is determined, testified with respect to the technical questions involved whether the car over the cab causes excess weight on the front wheels, and detrimentally affects steering, braking, headlights, front tires, front axles, vision, and strength of chains used in anchoring the automobile over the cab. In their opinion such equipment is dangerous and unsafe.

**Defendants also called Alfred Baxter, Harry Edwards and Leroy Marshall, who have been employed and have had experience as drivers of this type vehicle. Their testimony was to the effect that the vision of the operator thereof was obstructed; that the top-heavy weight over the cab interfered with steering and braking, particularly upon curves, because of the slow response of the steering gear, and the inside pull, with a resultant difficulty in straightening out after completion of curves.

In this connection it may again be said that a system of general regulation, such as we have in the Vehicle Code, prescribing the manner and by whom motor vehicles shall be operated upon the highways of the state, is necessary to promote the safety of persons and property within the state. If an exercise of this power, such as is found in the act before us, be not unreasonable, arbitrary or capricious, and the means selected shall have a real and substantial relation to the object sought to be attained, it does not constitute the taking of property without due process of law. The procedure whereby the purpose is achieved is beyond the power of the courts to question. There is no appeal to the courts from the judgment of the legislature as to the wisdom or policy which the Commonwealth shall adopt. Our inquiry is limited to the determination of the question whether the means of regulation chosen by the legislature are "reasonably adapted to the end sought." To go further would be to usurp powers committed to another department of government: *Powell* v. *Com.*, 114 Pa. 265, 127 U. S. 678; *Com.* v. *Vrooman*, 164 Pa. 306; *Rohrer* v. *Milk Control Board*, 322 Pa. 257; *C. B. & Q. R. R. Co.* v. *Maguire*, 219 U. S. 549; *Nebbia* v. *N. Y.*, 291 U. S. 502. In the latter case, Mr. Justice Roberts said (p. 537): "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a Court *functus officio.*"

Where, as in the present case, the legislature in its judgment supported by facts known to it, determines that the operation upon the highways of the state of a dangerous and unsafe type of vehicle must be prohibited, such a regulation does not violate the guaranty of due process, in the absence of discrimination or arbitrary abuse of power.

A similar question was presented in the recent case of *South Carolina State Hwy. Dept.* v. *Barnwell Bros. Inc.*, *supra*, where a statute of South Carolina prohibited the use on the state highways of motor trucks whose width exceeded ninety inches, and whose weight including load exceeded 20,000 pounds. One of the grounds upon which the statute was attacked was that it infringed the due process

clause. In sustaining the statute as a safety measure and a means of securing the economical use of the state's highways, Mr. Justice Stone said (p. 190): "* * * The judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. * * * And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. * * * When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision."

For the same reasons there is no merit in the plaintiff's contention that the act here assailed denies to them the equal protection of the laws and constitutes special legislation. This is based upon the charge that equipment of the type operated by them is discriminated against in favor of other types whereby part of the cargo is carried over the cab. Plaintiffs sought to establish by photographic evidence that trucks operate upon the highways of the state with portions of their cargoes extended over the head of the operator of the truck.

Here the evil sought to be prevented is the practice of carrying an automobile over the cab of a vehicle. The legislature by enacting Section 1033 (c) has efficiently directed its effort toward the prohibition of that practice. That other persons in the trucking business may continue to engage in practices, not prohibited by Section 1033 (c) but equally and similarly dangerous is not enough to render the Section in question unconstitutional, because the right of the legislature to classify with reference to the particular evil sought to be prevented is undoubted. An act designed to remedy an existing ill may not be declared invalid be-

cause it leaves other ills unremedied. It is not required that the entire field of possible abuses be covered: *Patsone* v. *Com. of Pa.*, 232 U. S. 138; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224; *Clark* v. *Paul Gray, Inc., et al.*, 83 L. Ed. (Adv.) 736.

In the *Keokee* case, *supra*, Mr. Justice Holmes aptly said (p. 227): "* * * it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear * * *."

Two questions arising under the "commerce clause" of the Federal Constitution remain for consideration. First, Is the Section invalid because it imposes an unreasonable burden upon interstate commerce? Second, Has Congress by the Motor Carrier Act, 1935, (49 U. S. C. A. Secs. 301-327) and the Interstate Commerce Commission, by regulations issued pursuant thereto, occupied the entire field of regulation of interstate motor carriers?

Much stress is laid upon the proposition that the enforcement of the act will place an unreasonable burden upon interstate commerce, which plaintiffs say, is forbidden under the decisions construing the commerce clause. It is asserted that the subject is one which requires uniformity of regulation throughout the states, otherwise different standards, designs, equipment and rules with respect to the vehicles used might be prescribed by the various states through which they are operated; that such regulation, if imposed at all, must be through the action of Congress, which alone can establish a uniform rule.

The answer to this contention of plaintiffs is to be found in the recent case of *Kelly* v. *Washington*, 302 U. S. 1, wherein there was challenged a state law relating to the inspection and regulation of vessels. The Supreme Court sustained the statute in relation to the inspection of the hull and machinery of vessels, and held that there was a field in which the state law could operate without conflicting with federal laws. It said (p. 13): "In the instant case,

* * * the state law touches that which the federal laws and regulations have left untouched."

That case is illustrative of the principle which we think is properly applicable here,—that in the absence of the exercise of federal authority the state is free to exert an essential protective power, even though interstate commerce is directly affected.* Mr. Chief Justice Hughes states therein the rule in these words, (p. 9): "Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected * * * (p. 14) When the state is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess."

Plaintiffs urge, however, that the rapid development of the automotive industry and its use as a medium of transportation, demand national control in order that the flow of interstate commerce involving such facilities shall be free and untrammeled. It is claimed that the present act places an arbitrary burden upon such traffic, since automobiles are manufactured in the great centers of automobile building west of Pennsylvania, and all movements of such vehicles to the eastern states must pass through this state in interstate commerce; that while in terms the act applies equally to vehicles moving in intrastate and interstate traffic, its provisions in consequence discriminate against interstate operators.

Plaintiff's contention, however, ignores the fact that protection against accidents on the highways is primarily a state function. It is essentially a local problem, and involves conditions calling for accident prevention which are related to the character of the highways and the topography of the country which such vehicles traverse. According to the evidence, the terrain of Pennsylvania as a whole is "rough and broken up" with numerous hills, mountains and sharp curves. It has been found that these physical

* See the latest decision of the Supreme Court upon the subject in *Eichholz v. Public Service Commission*, 83 Law. Ed. (Adv.) 505, 507.

features increase the danger of operation of such equipment upon the highways of the Commonwealth. These vehicles in making sharp curves, particularly on the steep grades in the mountainous regions, which must be traveled to reach the eastern seaboard, completely block the highway. Their length and their height make it necessary to swing them to the center of the highway, with attendant dangers to oncoming traffic. They are thus a continuing menace to other users of the highway, and far more dangerous when operated upon the highways of this state, with their steep grades and sharp curves, than upon the roads of most states in the eastern portion of the United States.

The extent to which interstate commerce may be affected by a state law designed to promote safety upon its highways, is thus definitely announced by Mr. Justice Stone in the *South Carolina* case, *supra*. He says (p. 189): "The nature of the authority of the state over its highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But 'in the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' * * * This formulation has been repeatedly affirmed, [citing cases] * and never disproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. * * * In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits, because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."

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* The cases cited in the opinion are *Morris v. Duby*, 274 U. S. 135, 143; *Clark v. Poor*, 274 U. S. 554, 557; *Sprout v. South Bend*, 277 U. S. 163, 169; *Sproles v. Binford*, 286 U. S. 374, 389, 390; cf *Morf v. Bingaman*, 298 U. S. 407.

See also *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245; *Bradley v. P. U. C.*, 289 U. S. 92.

Of course, there always remains the plenary power of Congress, which may determine that the burdens imposed by state regulation upon interstate commerce are too great, and by legislation to secure uniformity and to protect the national interest in commerce, Congress may curtail the exercise of the state's regulatory power: *South Carolina State Hwy. Dept. v. Barnwell Bros. Inc., supra.* For the reasons stated and upon these authorities, the conclusion of the court below must be sustained that "Section 1033 (c) is not unconstitutional as an unreasonable and invalid burden on interstate commerce, and does not discriminate against interstate commerce."

The second question arising under the commerce clause is whether Congress, by the enactment of the Motor Carrier Act, 1935, has assumed exclusive control of the regulation of interstate motor carriers. Plaintiffs assert that whatever regulatory power the state possessed has been entirely superseded, as Congress has manifested an intention of exercising its paramount authority over the entire subject. However, it clearly appears from the cases decided in the federal courts, since the effective date of the act, that the position of plaintiffs cannot be supported. The construction placed thereon by the Supreme Court, particularly where questions of safety involving the exercise of the state's police power are concerned, is not to set aside state regulation, but on the contrary, to sustain such action until a federal law, or regulation, direct, positive and irreconcilable with the statute of the state has taken its place.

It is not to be questioned that Congressional legislation upon any phase of interstate commerce supersedes all state regulation in the same field, and that if Congress by the enactment of the Motor Carrier Act has taken over the entire supervision and control of interstate transportation by motor vehicles, then in deference to the federal law, all state regulation becomes uninforceable and is invalidated.

Notwithstanding this established rule, there is a fundamental principle in this connection that must not be overlooked. Congress in its judgment may decide to occupy only a portion of the field of regulation, and may leave to the state matters not affected by federal legislation. It may

limit itself to a restricted field of regulation, and leave untouched matters of state or local concern which call for the exercise by the state of its police power. As we have seen, this was the rule so carefully laid down by the Supreme Court in *Kelly* v. *Washington, supra,* and which the Chief Justice announced in these words (p. 10): "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field, and otherwise admissible, is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "*

We believe the principle so approved rules the present case,—that where Congress, in acting, indicates an intention to take over a limited field of regulation, the State, within the area left unoccupied, may continue to exercise its police power in the interest of safety, provided that the acts so passed are not in conflict with Federal legislation. The question then arises,—is there any provision contained in the Federal act which assumes to provide for the safety of persons and property upon the highways of the several states, or which regulates the operation thereon of vehicles which are a menace to public safety.

A study of the provisions of the Motor Carrier Act reveals a clear purpose of Congress to confer upon the Interstate Commerce Commission full jurisdiction in the commercial, financial and business aspects of interstate highway transportation and to leave untouched in the hands of the states control over the preservation of the roads and the maintenance of safety thereon. This was the view adopted in *Thompson v. McDonald*, 95 Fed. (2d) 937, (C. C. A. 5th

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*Among the cases cited in the opinion in support of this principle are: *Reid v. Colorado*, 187 U. S. 137, 148; *Savage v. Jones*, 225 U. S. 501, 533; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294; *Atchison T. & S. F. Ry. Co. v. Railroad Commission*, 283 U. S. 380, 392, 393; *Mintz v. Baldwin*, 289 U. S. 346, 350.

Cir.) 1938, where it is held (p. 943): "The Interstate Commerce Commission has jurisdiction over the commercial considerations appertaining to the interstate truck business, but the preservation and safety of the roads themselves has been left with the state commissions. It is well settled that if Congress occupies only a limited field, then state regulation is not prohibited."

This intent of Congress to restrict the act to the regulation of commercial practices involved in motor transportation rather than to considerations of safety, clearly appears from Section 202 of the act (49 U. S. C. A. 302) which provides in part as follows: "(a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; * * *"

While Section 204 (a) 1, 2 and 3 of the act (49 U. S. C. A. 304) does confer upon the Commission power to establish reasonable requirements concerning safety of operation and equipment, the general language of this Section is necessarily modified and limited by the specific direction to the commission set forth in Section 225 (49 U. S. C. A. 325) of the act "to investigate and report on the need for Federal regulation * * *." Consequently it would appear that Congress intended to leave the regulation of such matters as safety and preservation of the highways in the control of the states until a future time.

This conclusion was reached by the Supreme Court in the recent case of *Welch Co.* v. *New Hampshire*, 59 Supreme Court 438 (Jan. 30, 1939), where it was held that a State law limiting the continuous hours on duty of the operators of trucks was not superseded by the Federal Motor Carrier Act. Mr. Justice Butler said (p. 441): "In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress

intended to supersede any state safety measure prior to the taking effect of a Federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed * * * Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using State highways."

Again, reference is made in this connection to the decision of the Supreme Court in *South Carolina State Hwy. Dept.* v. *Barnwell Bros. Inc. supra,* where, notwithstanding the Federal Motor Carrier Act, 1935, the State retained the power, in order to conserve its highways and maintain safety thereon, to legislate respecting weights and widths of vehicles using its highways.

A review of the cases decided in the Federal Courts since the Motor Carrier Act became effective indicates that State regulations pertaining to general safety problems have not been superseded. The recent decisions of the Supreme Court, as we have seen, have held that state laws relating to safety and protection of the highways are not displaced until Congress shall have supplied a Federal law or regulation to take the place of the State law. Congress has not yet taken such action, and our conclusion is that neither the Motor Carrier Act, 1935, nor any regulation of the Interstate Commerce Commission has superseded the legislative power of this State to enact and enforce Section 1033 (c) of the Vehicle Code.

In arriving at this conclusion we have not overlooked the report of the Interstate Commerce Commission originally dated December 23, 1936,* which is printed as an appendix to plaintiffs' brief. This report was issued upon the plaintiff's petition with the Interstate Commerce Commission to reopen the proceedings ex parte No. MC–4, which was filed by the plaintiffs after the entry of the decree *nisi* by the court below, and *it was not considered by the court below, nor is it part of the record on this appeal.* The report is negative in character, is based entirely upon ex parte testi-

* This report is captioned "Ex Parte No. MC-4 In the Matter of Qualifications of Employees and Safety of Operation and Equipment of Common and Contract Carriers by Motor Vehicles. In re Car Over Cab Operations."

mony, and a careful study thereof discloses no intention that it was to constitute a formal rule or regulation of the Commission with respect to the operation of car over the cab equipment. Certainly it cannot be regarded as having a purpose to replace existing State law upon the subject.

Since the argument of this appeal, an amendment to section 1033 (c) was signed by the Governor of the Commonwealth on June 27, 1939. It reads as follows: "No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle the weight of which is directly above the cab of the carrier vehicle or directly over the head of the operator of such carrier vehicle."

As the amending act contains no effective date, its provisions become operative from and after September 1, 1939, in accordance with Section 4 of the Statutory Construction Act of May 28, 1937, P. L. 1019, 1020. Therefore the present Section 1033 (c) of the Act of 1937 remains in full force and effect until August 31, 1939, and prosecutions for violations thereof may be brought during the months of July and August of this year. In consequence, this appeal has not become moot.

However, we have considered the language of the amendment and are of opinion that no essential change is made in the prohibition of the statute. Whatever may have been the legislative purpose in promulgating the amendment, it has not modified the effect of this Section.

It is to be seen that the present act forbids the carrying of any vehicle "any part of which is above the cab of the carrier vehicle," while the amendment forbids the carrying of any vehicle "*the weight of which* is *directly* above the cab of the carrier vehicle." From the evidence in the present record it would seem to us that the detrimental effect upon balance, steering, braking and vision remains the same, whether any part of the carried vehicle, or of its weight rests upon the cab, or is directly above the cab of the carrier vehicle. Accordingly the amendment must be read as intending that the carrying of any portion of the weight of the carried vehicle directly over the cab is forbidden. This in effect is the prohibition of the present Section.

The decree of the court below dismissing the bill of complaint is affirmed. Appellants to pay the costs.

EXHIBIT "B".

In the Court of Common Pleas of Dauphin County.

Sitting in Equity.

No. 1308 Equity Docket 1937.

No. 281 Commonwealth Docket 1937.

ALFRED A. MAURER AND MARCUS W. MYERS, TRADING AS MAURER & MYERS AUTO CONVOY,
Plaintiffs,

vs.

J. GRIFFITH BOARDMAN, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA; P. W. FOOTE, COMMISSIONER OF THE PENNSYLVANIA MOTOR POLICE; AND CHARLES J. MARGIOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Defendants.

Opinion.

This case comes before us on bill of complaint praying that Section 1033 (c) of the Act of 29th June 1937 P. L. 2329-2401, which provides that:

> "(c) No person shall operate a vehicle on the highways of this Commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle.
> * * *
>
> "Penalty—Any person violating any of the provisions of this section shall, upon summary conviction before a magistrate, be sentenced to pay a fine of twenty-five ($25) dollars and costs of prosecution, and, in default of the payment thereof, shall undergo imprisonment for not more than five (5) days.",

be declared unconstitutional, illegal and void for the reasons therein stated.

Many other parties or corporations have intervened a plaintiffs in these proceedings.

The pleadings consist of praecipe for appearance, plai tiffs' bill of complaint, injunction affidavits, decree awar ing preliminary injunctions, plaintiffs' bond approved b the court, answer of the defendants, and notes of testimon taken at the hearings.

Requests for findings of fact and conclusions of law hav been filed by the parties hereto which we have answered an direct to be filed as a part of the record in this case.

Findings of Fact.

1. Plaintiffs, Alfred A. Maurer and Marcus W. Mye are members of a partnership, trading as Maurer & Mye Auto Convoy, which name is registered under the provisio of the Fictitious Names Act of Pennsylvania, and the principal office is located in Bloomsburg, Columbia Count Pennsylvania.

2. The defendant, J. Griffith Boardman, is the Secreta of Revenue of the Commonwealth of Pennsylvania, and a such is the head of the Revenue Department of said Co monwealth and is in charge of the administration of sa department.

3. The defendant, Admiral P. W. Foote, is the Commi sioner of the Pennsylvania Motor Police.

4. The defendant, Charles J. Margiotti, is the Attorn General of the Commonwealth of Pennsylvania and is t head of the Department of Justice and the chief enforceme officer of said Commonwealth.

5. The defendants admit that they threatened to enfor against the plaintiffs the provisions of Section 1033 (c) the Act of 1937, P. L. 2329-2401, prior to the granting of t preliminary injunction, and that they have instituted pros cutions under said section in a number of cases throughou this Commonwealth.

6. The administration of the Vehicle Code of 1929 P. 905, including the amendatory Section 1033 (c) of the A

of 1937 P. L. 2401, is under the Department of Revenue of which the defendant, J. Griffith Boardman is the Secretary and the head; the enforcement of said section is fixed in the Pennsylvania Motor Police of which the defendant, Admiral P. W. Foote is the Commissioner, and in the Department of Justice of which the defendant, Charles J. Margiotti, is the Attorney General and head.

7. In conducting their operations the plaintiffs, in the transportation of automobiles as common carriers have registered certain vehicles in Pennsylvania and have paid to the Department of Revenue the registration fees required therefor for the year 1937, said vehicles being specially designed to transport automobiles, a portion of one of which transported automobiles rests over the cab of the transporting vehicle.

8. The Congress of the United States enacted the Motor Carrier Act, 1935, approved August 9, 1935 by the President (U. S. Code, Supp. I, Title 49, sections 301 to 327), providing generally for the regulation of transportation of passengers and property in interstate commerce.

9. Congress by statutory enactment and the Interstate Commerce Commission by orders, requirements, rules and regulations, now regulate transportation of property in interstate commerce with respect to safety of operation and equipment.

10. Plaintiffs, intervenors, and other automobile transporters transport a substantial number of automobiles by motor vehicle into and through this Commonwealth.

11. Plaintiffs, intervenors and other automobile transporters own and/or operate a substantial number of automobile-carrying vehicles on which part of the carried automobiles are above the cab of the carrier or over the head of the operator of such carrier vehicle.

12. The "haulaway" (defendants' term for the business of plaintiffs) business is sometimes engaged in by private carriers not subject to Federal regulation.

13. The Interstate Commerce Commission has taken n steps which usurp the field of regulation over the "hau away" business to the exclusion of various States.

14. The presence of an automobile over the cab of th truck-tractor of a haulaway combination results in a highe center of gravity than in normal trucking operations.

15. Such high center of gravity in a haulaway makes it operation dangerous, particularly on curves and hills o the types found in Pennsylvania.

16. The automobile over the cab of a haulaway cause excess weight on the front wheels and makes the haulawa more difficult to steer.

17. Such excess weight results in overloading the fro axles and the front tires of the haulaway and adversel affects braking, particularly on curves.

18. Such excess weight results in throwing the headligh of the haulaway out of focus, to the detriment of oncomin traffic and the operator of the haulaway.

19. Such excess weight so affects the balance of the hau away as to make its operation unsafe.

20. The presence of the automobile over the cab obstruc the vision of the operators of overtaking vehicles; and o structs the vision of the operator of a haulaway.

21. The runway over the hood, placed there for the pu pose of supporting an automobile over the cab, obscures th vision of the operator of the haulaway.

22. The vertical framework supporting the runway fo the automobile over the cab impairs the vision of the o erator of the haulaway.

23. The presence of an automobile over the cab resul in haulaways being operated on the wrong side of th road because of overhead obstructions, and also becaus the vision of the operators is obscured.

24. In the event of collision there is a tendency for th automobile over the cab of the haulaway to become d tached and to fly off.

25. The chains used to anchor the automobile over the cab are insufficient to overcome the force stored therein under certain circumstances; and the supporting structure is not strong enough to resist the stress which may be transmitted to it in the event of collision.

26. On May 16, 1934, there was a collision in New York City in which the automobile over the cab of a haulaway became detached and damaged the vehicle with which it collided and injured the operator thereof.

27. On June 23, 1937 there was a haulaway involved in an accident north of Mt. Pocono, which resulted in the automobile partially over the cab becoming detached.

28. On August 17, 1937, near Tobyhanna, a haulaway was involved in an accident, as a result of which the automobile over the cab became partially detached.

29. On February 14, 1936 there was a collision near Erie in which the automobile over the cab became partially detached and damaged the automobile with which the haulaway collided, as a result of which collision the operator of the other car received fatal injuries.

30. On September 22, 1934, near Scranton, an operator of a haulaway lost control, as a result of which the automobile over the cab became completely detached and flew off.

31. On December 18, 1936, in Chester County, in a collision between a haulaway and another automobile the automobile on the upper deck of the haulaway flew off.

32. No attempt has been made to reconstruct the present non-conforming equipment so as to conform with the Act complained of, and non-conforming equipment has been purchased since the Act became effective.

Discussion

Plaintiffs contend that:

(1) The statute we have under consideration is invalid since the right of the Commonwealth to prescribe such re-

strictions and prohibitions as to interstate commerce was superseded by the passage by Congress of the Motor Carrier Act and by the action of the Interstate Commerce Commission in pursuance of the power granted thereunder.

(2) Even in the absence of federal legislation the statute is a direct and unreasonable, arbitrary and invalid burden on interstate commerce.

(3) The statute is not a proper exercise of the police power since the means adopted are arbitrary and unreasonable and have no reasonable and direct relationship to the public safety.

(4) The statute is invalid because it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and is special legislation of a type prohibited by the Pennsylvan[illegible] Constitution.

As stated in our findings of fact, section 1033 (c) of the said Act of 1937, P. L. 2401, provides:

> "No person shall operate a vehicle on the highways of this commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle."

The title of this Act (P. L. 2329) provides, *inter alia* as follows:

> "An Act to amend the Act approved the first day of May, one thousand nine hundred twenty-nine (Pamphlet Laws, nine hundred five), entitled 'An Act for the protection of the public safety; regulating the use of highways, and the operation of vehicles, tractors, street cars, trackless trolley omnibuses, * * * upon the highways of this Commonwealth * * *', as amended, by adding new sections further regulating the use of highways and the operation of and the equipment used in connection with vehicles including trailers, and semi-trailers, street cars, trackless trolley omnibuses * * *."

We think the jurisdiction of the Commonwealth of Pennsylvania over its highways cannot be doubted. The establishment, maintenance and control of highways has always been deemed to be within the police power of the respective states: *New Orleans Gas Light Co.* v. *Louisiana Light and Heat Producing and Mfg. Co.*, 115 U. S. 650-673, 29 L. Ed. 516; *Hodge Drive-It-Yourself Co.* v. *Cincinnati*, 284 U. S. 335.

The long-existing police power of the Commonwealth as exercised by the Legislature in The Vehicle Code upheld by the Supreme Court in *Commonwealth* v. *Funk*, 323 Pa. 390, where it is held:

> "The legislature has plenary power over the highways of the state.
>
> "In the exercise of its power to control and regulate the use of the highways, and under the inherent police power of the State the legislature has the power to regulate the manner and circumstances under which, and by whom, automobiles may be operated upon the highways of the state.
>
> "The privilege to operate a motor vehicle upon the highways is not embraced within the term civil rights, nor is a license to do so a contract or a right of property in any legal or constitutional sense."

We think that said section can be sustained, the police power of the Commonwealth authorizing its enactment by the Legislature. We quote from the opinion of Mr. Chief Justice Kephart in *Commonwealth* v. *Stofchek*, 322 Pa. 513, 519:

> "But, the State possesses inherently a broad police power which transcends all other powers of government. There is therefore no unqualified right to acquire, possess, and enjoy property if the exercise of the right is inimical to the fundamental precepts underlying the police power. This court said in *Commonwealth* v. *Widovich*, 295 Pa. 311: 'The police power is the greatest and most powerful attribute of government; upon it the very existence of the State depends. • • • If the exercise of the police power should be in

irreconcilable opposition to a constitutional provision or right, the police power would prevail.' It needs no constitutional reservation or declaration to support it: *City of Scranton* v. *Public Service Commission*, 268 Pa. 172. * * *"

We think said section 1033 (c) is a safety measure, and is peculiarly within the police power of the state. Such a statute the Legislature not only had the power but also the duty to enact, to provide for the public safety. In *Pennsylvania Railroad Co.* v. *Ewing*, 241 Pa. 581, 595, the court said, in discussing the Full Crew Law of 1911:

"* * * The legislature was not only empowered to pass it, but was charged with the duty of enacting it, if the safety of those within the contemplation of the act required it. * * * That was a purely legislative question, with which courts can no more interfere than they can with reasonable means adopted by the legislature to secure the needed safety. * * *"

It is contended by plaintiff that section 1033 (c) is unconstitutional in violation of the Fourteenth Amendment of the United States Constitution. This contention we cannot follow. It can no longer be questioned that once a statute is found to be within the power of the Legislature to promote public safety, the procedure whereby this purpose is achieved is beyond the power of the courts to question, so long as the procedure bears a reasonable relation to the end sought. In *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 267, we find:

"* * * The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means

selected shall have a real and substantial relation to the object sought to be attained. * * *"

See also *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940.

It has been well settled in Pennsylvania and elsewhere that statutes are presumed to be constitutional. See *Kelley* v. *Baldwin*, 319 Pa. 53.

We are of opinion that said section 1033 (c) is a safety measure, and that the plaintiffs have failed under the testimony at the hearings, to meet their burden of proof that such haulaway operations, contemplated in said section, are unsafe and are not a suitable subject of legislative interference.

Users of public highways, though engaged exclusively in interstate commerce, are subject to regulations by the state to insure safety and convenience and conservation of the highways: *Pennjersey Rapid Transit Co.* v. *City of Camden*, 142 Atl. 821. Reasonable police regulations by state or municipality, applicable to interstate motorbus traffic, are valid and not direct or undue burdens on interstate commerce: *People's Rapid Transit Co. et al.* v. *Atlantic City*, 144 Atl. 630-631; *American Coach System* v. *Philadelphia*, 28 Fed. (2d) 736; *Atlantic-Pacific Stages* v. *Stahl*, 36 Fed. (2d) 260; *Nuttley-Times Square Service* v. *Public Utility Commissioners*, 162 Atl. 124; *Fla. Motor Lines* v. *Railroad Co.*, 132 So. 851; *State* v. *Wetzel*, 243 N. W. 768; *Railroad Commission* v. *McDonald*, 90 S. W. (2d) 581; *Butte* v. *Roberts*, 23 Pac. (2d) 342.

In the absence of national legislation, states, notwithstanding the due process clause, have reserved police power to prohibit dangerous vehicles from operating on its highways; and statutes limiting the length of single vehicles or combination of tractor and semitrailer or trailer are not void as denying due process; *Contract Cartage Co.* v. *Morris et al.*, 59 Fed. (2d) 437. In the absence of congressional action the states may regulate interstate commerce in the interests of public safety: *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 77 L. Ed. 1053.

We think the act complained of does not discriminate against interstate commerce and that plaintiffs have failed to prove that said section 1033 (c) does discriminate against

interstate commerce in favor of intrastate commerce in any manner whatsoever. See *Interstate Buses Corporation* v. *Holyoke Street R. Co.*, 273 U. S. 45.

Plaintiffs contend that by the Motor Carrier Act of 1935 Congress and the Interstate Commerce Commission have so taken possession of the field of regulation of interstate motor carrier that the rights of the State to regulate such carriers have been eliminated. We think the facts and the cases decided since the passage of that act fail to support this contention.

We think that all questions arising under the Interstate Commerce Clause of the United States Constitution have been completely and adequately answered by the recent decision of the United States Supreme Court in the case of *South Carolina State Highway Dept. et al.* v. *Barnwell Brothers, Inc. et al.*, 82 Supreme Court Reports (L. Ed.) 469, 470. In that case as in the instant case, it was contended that the act was an invalid burden on interstate commerce, and that Congress and the Interstate Commerce Commission, under the Motor Carrier Act of 1935, had usurped the field of safety regulation of interstate motor carriers to the exclusion of the States. A careful study of the South Carolina case leads us to the conclusion that State statutes, regulating the use of its highways for safety and protection in general, and section 1033 (c) in particular, are constitutional unless one of the following elements is present: (1) direct and specific legislation or regulation by Congress on the particular type of safety regulation challenged, as here, haulaways carrying cars over the cabs; (2) discrimination against interstate commerce in favor of intrastate commerce; (3) violation of the Due Process Clause by statutes not within the police power of the State. In the absence of these three elements, the validity of section 1033 (c) cannot be questioned.

In the South Carolina case the lower court found that the act there complained of satisfied the due process requirements, but was an invalid burden on interstate commerce. The United States Supreme Court exploded the theory that a valid exercise of the police power can be a burden on interstate commerce as to motor traffic using the State highways. Mr. Justice Stone, in his opinion,

makes repeated references to decisions wherein a burden on interstate commerce actually existed, and yet the statute was deemed valid. We quote from his opinion:

> "* * * With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.
>
> "* * * This Court has often sustained the exercise of that power (power of a state to make safety regulations for its highways) although it has burdened or impeded interstate commerce. * * *"

After citing a number of cases the court said:

> "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states."

Finally, in reversing the court below, the Supreme Court said:

> "The regulatory measures taken by South Carolina are within its legislative power. They do not infringe the Fourteenth Amendment, and the resulting burden on interstate commerce is not forbidden."

We think the above quoted decision clearly requires plaintiffs to show either discrimination or usurpation by Congress before section 1033 (c) can be deemed a violation of the Commerce Clause. The Superior Court of Pennsylvania very recently expressed the same view in *Commonwealth* v. *Kennedy*, 129 Pa. Superior Ct. 149, 167, where it was held:

> "This delegation of power to the Federal government did not take away from the states, in the absence

of Congressional legislation to the contrary, the power to regulate matters of local concern, even though they also concerned interstate commerce. Commonwealth *v.* One Dodge Motor Truck, 123 Pa. Superior Ct. 311, 330-333, 187 A. 461 (1936), affirmed in 326 Pa. 120, 191 A. 590 (1937), and cases therein cited.

"It has frequently been held that the regulation of highways for the safety and convenience of its citizens is a matter of local concern for the State, so far as it does not conflict with any act of Congress and so long as it does not discriminate against interstate commerce."

In plaintiffs' contention that the statute is invalid because it violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and is special legislation of a type prohibited by the Pennsylvania Constitution, they rely on what they consider the cardinal principles relating thereto as set forth in *Chalmers v. City of Philadelphia*, 250 Pa. 251; *Wood* v. *Philadelphia*, 46 Pa. Superior Ct. 573; and *Germantown Trust Co. v. Powell*, 265 Pa. 71, 82.

In *Chalmers* v. *City of Philadelphia* it was said at page 254:

"In the absence of real and genuine distinctions classification is not permitted. This is the settled doctrine of our cases. *Com.* v. *Casey*, 231 Pa. 170; *Ashworth* v. *Pittsburgh Rys. Co.*, 231 Pa. 539."

In *Germantown Trust Co.* v. *Powell* it was said at page 81:

"* * * 'Classification to be valid, must be based upon a necessity springing from manifest peculiarities clearly distinguishing those members of one class from each of the other classes, and imperatively demanding legislation from each class separately that would be detrimental to the others.' Ayars' App., 122 Pa. 266; *Com.* v. *Puder*, 261 Pa. 129, page 135 * * *."

Plaintiffs also contend that section 1033 (c) discriminates against the haulaway business in favor of other types

of trucking operations wherein part of the cargo is carried over the cab, attempting to prove this contention by a series of photographs introduced into evidence and marked Plaintiffs' Exhibits 22 to 27 inclusive, and they also amended their bill to plead such discrimination.

We think plaintiffs' contention of special and discriminatory legislation can be answered by referring to *Patsone* v. *Pennsylvania*, 232 U. S. 138, in which it appeared that a Pennsylvania statute made it unlawful for an unnaturalized foreign-born resident to kill any wild bird or animal except in self-defense, and to that end made unlawful for any such person to own or be possessed of a shot-gun or rifle. Patsone, an unnaturalized foreign-born resident, was fined under this act. He appealed on the ground that the statute was unconstitutional because it discriminated against aliens as a class. The act was held constitutional. We quote from the opinion:

> "* * * a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley* v. *National Carbonia Gas Co.*, 220 U. S. 61, 80, 81. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' * * *"

It is apparent that the Legislature directed section 1033 (c) against a particular evil, that is, the carrying of automobiles over the cab of a haulaway. The mere fact that there may also be danger involved in carrying other types of cargoes over the cabs of other types of trucks will not serve to invalidate this section.

We think the title of the Act is not defective. The plaintiffs have raised the question of the adequacy of the title of the Financial Responsibility Law. This issue is invariably raised whenever the constitutionality of a statute is being questioned, and has resulted in many decisions by the Supreme Court to the effect that the title does not have to be an index to the contents of the bill.

The real purpose of the constitutional provision was explained in *Mullinger* v. *Pittsburgh*, 316 Pa. 257, 261, where Mr. Justice Maxey said:

> "* * * The constitutional provision (Article III, section 3) * * * was intended merely to prohibit the practice of passing what were known as 'omnibus bills,' containing subjects foreign to each other, and whose title was on that account calculated to mislead and deceive; and a bill may still contain any number of provisions properly connected with and germane to the expressed subject, without violating the constitutional requirement. * * *"

See also *Orlosky* v. *Haskell*, 304 Pa. 57.

Section 1033 (c) was added to the Vehicle Code by Act No. 447, the title of which indicates that the Vehicle Code is being amended "by adding new sections further regulating the use of highways and the operation of and the equipment used in connection with vehicles, including trailers and semi-trailers * * * upon the highways of this Commonwealth." Both the original title of the Vehicle Code and the title of Act No. 447 of 1937, amending it, disclose the intent of the Legislature to protect the public safety and to regulate the use of highways. Under the decisions of our own Supreme Court further detailed notice is not necessary. We think the titles of the Vehicle Code and of Act No. 447 of 1937 are adequate notice under the Pennsylvania Constitution of the safety regulations enacted by the Legislature.

Many authorities have been cited by counsel which we have examined with care and from which we have reached the conclusion above stated. The citation of all of the au-

thorities referred to us would extend this opinion to an unnecessary length. A large amount of testimony was taken which we think does not need discussion in view of the conclusion reached.

CONCLUSIONS OF LAW.

1. The act here complained of, Section 1033 (c) of the Vehicle Code as amended by Act No. 447, approved June 29, 1937, P. L. 2329, is not unconstitutional as a deprivation of property without due process, but on the contrary is a valid exercise of the police power of this Commonwealth.

2. Section 1033 (c) is not unconstitutional as an unreasonable and invalid burden on interstate commerce, and does not discriminate against interstate commerce.

3. Neither Congress, under the Motor Carrier Act of 1935, nor the Interstate Commerce Commission, has usurped the field of safety regulation of interstate motor carriers to such an extent as to remove the authority of the Pennsylvania Legislature to enact Section 1033 (c) affecting interstate commerce.

4. The said act is not unconstitutional because of any deficiency in its title under Article III, Section 3 of the Pennsylvania Constitution.

5. Haulaways with an automobile partially or completely over the cab are properly classified as the subject for State legislation designed to promote safety, such as Section 1033 (c).

6. Plaintiffs by their pleadings and evidence, have not made out a sufficient case under the law to warrant the granting of injunctive relief by this court, and therefore the preliminary injunction heretofore granted should be dissolved and plaintiffs' bill dismissed at the cost of the plaintiffs.

FRANK B. WICKERSHAM,
Chancellor.

DECREE NISI.

And now, April 27, 1938, this case came before the Chancellor, testimony was taken and argument heard: it is therefore ordered, adjudged and decreed that the decree awarding a preliminary injunction to the plaintiffs is dissolved and the bill of complaint is dismissed at plaintiffs' cost. Unless exceptions be filed within thirty (30) days from the filing of this decree a final decree will be awarded. The Prothonotary is directed to give notice to the attorneys for the parties hereto as to the filing of this decree.

FRANK B. WICKERSHAM,
Chancellor.

* * * * * * *

And now, September 6th, 1938, exceptions dismissed.
By THE COURT,
FRANK B. WICKERSKAM,
A. L. Judge.

EXHIBIT "C".

Interstate Commerce Commission—Ex Parte No. MC-4

In the Matter of Qualifications of Employees and Safety of Operation and Equipment of Common and Contract Carriers by Motor Vehicle.

In re: CAR-OVER-CAB OPERATIONS.

Submitted July 7, 1938.

Decided March 11, 1939.

Upon further hearing the use of motor vehicles in the transportation of automobiles which are so constructed that all or part of one of the automobiles being transported protrudes over the cab of the carrying vehicle found not to be unsafe.

Sterling G. McNees, Bernard W. Butler, Leo Dougher and *Carney D. Matheson, J. Ninian Beall, L. S. Harris, Robert*

E. Quirk and *Ewald E. Kundtz, Glenn W. Stephens, George Keitel, James D. McHugh* and *Michael Donohue.*

REPORT OF THE COMMISSION.

DIVISION 5, COMMISSIONERS EASTMAN, LEE AND ROGERS.

BY DIVISION 5:

By order dated December 23, 1936, pursuant to the provisions of section 204 (a) (1) and (2) of the Motor Carrier Act, 1935, we prescribed rules and regulations governing the qualifications of drivers and the safety of operation of motor vehicles operated by common and contract carriers in interstate or foreign commerce. At the hearings which preceded the issuance of that order, no testimony was submitted concerning the safety of the type of motor vehicle used in transporting new automobiles which is so constructed that one of the new automobiles being transported extends in whole or in part over the cab of the truck or tractor and for that reason this question was not then considered.

This proceeding involves the single issue of whether such type of motor vehicle used in transporting new automobiles in interstate or foreign commerce is safe.

On May 5, 1938, M. & G. Convoy, Inc., et al.,[1] hereinafter referred to as the petitioners, requested that "the proceeding in Ex Parte MC-4 be reopened for the purpose of investigation and for the issuing of rules and orders governing the safety of operation of vehicles transporting automobiles, all or part of one car of which protrudes over the cab." The petition set forth that Section 1033 of the Laws of

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[1] The petition was filed by M. & G. Convoy, Inc., Mayer & Myers Auto Convoy, John G. Reeser, Plaintiffs, and George M. Wenner, Square Deal Cartage Company, Sprecher Bros., Martin L. Speck, Howard Sober, Inc., Paul W. Snyder, Leslie Reeser, Pontiac Auto Transport Company, Inc., H. H. Krout, Industrial Transport, Inc., Fleet Carrier Corporation, David E. Bister, Eastern Automobile Forwarding Co., Inc., E. & L. Transport Company, Central States Transit Lines, F. J. Boutell Driveaway Company, Tracy Baker Automobile Forwarding, Baker Driveaway Company, Automobile Shippers, Inc., who as interveners joined in the petition with the Plaintiffs.

the State of Pennsylvania (1937 P. L. 2329) reads in part as follows:

> (c) No person shall operate a vehicle on the highways of this commonwealth carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle.

The petition to reopen the proceeding was granted, by order entered June 17, 1938, and a hearing was set before an examiner. The hearing was held at Washington, D. C., July 6 and 7, 1938.

Highway Transportation of New Motor Vehicles

A large proportion of the motor vehicles manufactured in the United States are transported over the highways in interstate commerce from the factories or assembly plants to the distributors or dealers who sell them to the public. This transportation is performed by various methods, the chief of which are "driveaway" or "caravan" operations, in which the vehicle is driven under its own power to destination, sometimes also towing or carrying another vehicle; and "truckaway" operations, in which the new vehicles being transported are loaded upon a specially-constructed vehicle or combination of vehicles and carried as cargo. The latter vehicles are further classified by the industry into two types: "tudek" and "special". The "tudek" equipment, as the name indicates, consists of a truck-tractor and semi-trailer with two cars mounted on the lower deck of the semi-trailer, and two more mounted on the upper deck. No part of the cars protrudes over the cab of the truck-tractor.

The "special" equipment generally consists of a truck-tractor and semi-trailer or truck and full-trailer, usually carrying four new cars. In some instances, one of the cars is carried on the towing vehicle, mounted upon a steel structure over the cab; in others a portion of one of the vehicles mounted on a steel structure on the towed vehicle projects over the cab of the towing vehicle, although none of the load rests on the towing vehicle. In the latter cases, the extent to which the car projects over the cab varies from only a few inches to several feet.

Of all the types of vehicle used in transporting new cars and trucks over the highway from factory or assembly plant as briefly described above, only the safety characteristics of that type of "truckaway" operation in which one of the vehicles being transported projects in whole or in part over the cab of the power-unit are here under consideration.

At the hearing testimony and evidence were introduced by representatives of the petitioners, associations of affiliated transporters, manufacturers of equipment, insurance underwriters, and others who represented a large majority of carriers engaged in the "truckaway" operations.

It appears from the record that there are approximately 200 carriers engaged in truckaway and driveaway operations, of which about 50 are private carriers. All of the 150 common and contract carriers use the "special" equipment to greater or lesser extent. The total number of units (truck or tractor, plus full-trailer or semi-trailer) in use in truckaway operations by the 150 common and contract carriers was placed at 5,000 with an estimated cost of $3500 per unit, or a total initial investment of $17,500,000.

All of the common and contract carriers engaged in this transportation are engaged in interstate commerce. One such carrier who operates 64 units (44 "specials") of equipment out of Buffalo, N. Y., stated that approximately 50 percent of his transportation was interstate in character; another carrier operating 113 units (all "specials"), out of Flint, Mich., stated that 99 percent of his transportation was interstate; another carrier operating 30 units (15 "specials") out of Flint, Mich., stated that his operations were 100 percent interstate. No testimony was introduced to show that any such motor carrier was engaged exclusively in intrastate transportation of automobiles.

Technical Considerations

This investigation involves a study of the method of mounting vehicles upon the "special" equipment, and its effect upon safety of operations. One of the important elements is the structural adequacy of the supporting frames upon which such vehicles are to be mounted.

In the case of the foremost vehicle of the load being carried either on the towing vehicle or on the towed vehicle, it

appears from the record that in most if not all instances the steel structure upon which such vehicle is secured constitutes an integral part of the carrying equipment. Full consideration is given by manufacturers of such equipment to the strength and rigidity of those structural parts. Further, the record shows that adequate means are provided in all instances to secure the vehicles being transported firmly in place by suitable stops and hold-down chains.

So far as the height of the "special" equipment and its load is concerned, it was shown that these were well within State limitations and in many instances were less than those of conventional van-body trucks. Bearing upon the tendency of the "special" equipment to overturn in rounding a curve, it was shown that the center of gravity of such equipment when loaded was comparable to, and in many cases lower than, that of loaded van-type trucks.

In addition to considerations of safety, the interest of the shipper (in this case the automobile manufacturer) in seeing that the cars arrive at destination without marring or other damage has prompted them in numerous instances to have the loaded equipment inspected before transportation begins, in addition to such inspection as the carriers themselves may make.

The safety director for U. S. Trucking Lines, which is an owning and controlling management corporation of several motor carriers which operate in the Middle Atlantic States, submitted photographs which were taken by a commercial photographer from the cab of a "special" unit from an approximate position of the driver's eyes. These were submitted by this witness to show that the various types of traffic lights are clearly discernible without obstruction.

Three drivers of "special" equipment, with eight, six, and ten years' of driving experience in truckaway operations, respectively, testified that the car-over-cab structure with car in place provided no obstacle to vision from the driver's seat. The driver having ten years' experience testified that the shade provided by the overhead structure acted as a visor against the rays of the sun and thus facilitated safe driving. He also concluded that "special" equipment provided better traction in slippery weather and better braking.

Most of the evidence related to combinations of vehicles, either truck and full-trailer, or truck-tractor and semi-trailer. It is obvious, however, that the same considerations apply with equal force to a truck transporting motor vehicles as cargo.

Accident Frequency

Statistics were introduced at the hearing to show the accident frequency rates of various types of commercial vehicles. It was shown from the National Safety Council's "Accident Facts", 1938 Edition, that 49,952 trucks of all types which had travelled approximately 700,000,000 miles during 1936-37 had an accident frequeney of 2.94 per 100,000 vehicle-miles. The accidents tabulated in "Accident Facts" were based upon the following definition of an accident adopted by the National Safety Council: "a vehicular accident shall be any accident in which the vehicle is involved unless properly parked, where such accident results in death, personal injury, or property damage regardless of who is hurt, what property was damaged or who was responsible." All of the exhibits submitted at the hearing and hereinafter discussed were based on accidents as defined by the National Safety Council in the definition quoted above.

A composite exhibit was submitted by the witness Thompson, who is the Safety Director for the International Automobile Transporters Association. This exhibit, covering the period from January 1, 1937, to June 1, 1938, shows the accident frequency of 28 fleets, consisting of 346 "tudeks" and 218 "specials", travelling 12,325,310 and 11,452,816 miles respectively. The accident frequency was 1.32 for "tudeks" and 1.15 for "specials", or 1.24 for all vehicles of all fleets.

Other witnesses submitted exhibits showing accident frequency. A recapitulation of the exhibits, except those submitted by the witness Thompson for the period from January 1, 1937, to June 1, 1938, shows that the accident frequency for "tudeks" which had travelled a distance of 21,783,334 miles and were involved in 373 accidents of all kinds, was 1.71. During the same period special units which had travelled 23,064,753 miles and were involved in 307 accidents, had an accident frequency of 1.33. The combined

operations of the "tudeks" and "specials" covered a distance of 44,848,087 miles and were involved in 680 accidents. The accident frequency of the entire number of vehicles was 1.52.

A breakdown of the data shown on these various exhibits indicates that in the period from January 1, 1938, to June 1, 1938, the accident frequency of both "tudeks" and "specials" was less than the accident frequency during the calendar year 1937, as will be shown by the analysis now set forth.

An analysis shows that during 1937, 156 "tudeks" travelled a distance of 7,795,158 miles and were involved in 109 accidents. The accident frequency was 1.40. During 1937, 155 "special" units travelled a distance of 9,243,433 miles and were involved in 98 accidents. The accident frequency was 1.06. Three hundred eleven fleet units, including both "tudeks" and "specials", travelled a distance of 17,038,591 miles and were involved in 207 accidents. The accident frequency during the year 1937 was 1.21. Fleet operators who submitted the foregoing exhibits show that for the first six months of 1938, 121 "tudeks" travelled 2,684,670 miles and were involved in 36 accidents. The accident frequency was 1.34. One hundred thirteen "special" units travelled 2,316,875 miles and were involved in 20 accidents. The accident frequency was 0.86. The entire fleet consisting of 234 travelled 5,001,545 miles and was involved in 56 accidents. The accident frequency for this period of 1938 was 1.12 as compared to 1.21 for 1937.

The safety supervisor for five companies and the safety director for the National Automobile Transporters Association submitted other important testimony and comprehensive exhibits, tending to support the conclusion that transportation of automobiles by "special" equipment presents no special hazard and in fact enjoys a good safety record in comparison with other types of highway transport.

The Superintendent of Motor Transportation of the Public Utilities Commission of the State of Ohio testified that of the 235 reportable accidents in his State during the year 1936 only 6 were reported by motor carriers who operate the type of vehicles herein considered, and further that none of

the 6 accidents "was chargeable to vehicular defects or directly chargeable to this type of vehicle". Of the 262 accidents reported during 1937, only 5 were reported by motor carriers using this type of equipment. There was one accident in which the overhead structure of a "special" unit (unloaded at the time) contributed to the severity of the accident. This was the case of a rear-end collision with a school bus in which the overhead structure penetrated the rear of the bus. The cause of the accident, however, was not traceable to the type of construction of the "special" unit.

A sergeant of the Maryland State Police, whose duties include investigations of automobile accidents, submitting reports thereof, and making arrests for violation of the motor vehicle laws, testified: "I travel in the western section which is particularly mountainous, and I see this type of vehicle every day, three or four different units. I have travelled behind them down the mountains and up the mountains, on dangerous curves and hazardous parts of the road, and I have never come upon an accident involving any of them in the twelve years I have been with the department."

Conclusions

The record discloses no testimony whatsoever to show that the operations of motor vehicles used in transporting new automobiles which are so constructed that one of the automobiles being transported extended in whole or in part over the cab, is unsafe. On the contrary, the evidence is clear that the average number of accidents in which vehicles of this type are involved is less than the country's average for all trucks. We find no reasons of record why the operations of such vehicles should be forbidden. The safety regulations heretofore prescribed by us, of course, apply to these as well as other vehicles operated by common and contract carriers in interstate or foreign commerce. The operation of vehicles so equipped are therefore permitted by the existing regulations and there is no need for change.

As indicated in the foregoing discussion, the conclusions which we have reached on the evidence of record are not in harmony with a provision of the Laws of the Commonwealth

of Pennsylvania which prohibits the operation of vehicles of the type in question. The validity of this provision was sustained by a decision, rendered April 27, 1938, of a judge of the Dauphin County court of Pennsylvania. So far as we are informed, the laws of no other State contain a similar prohibition.

When this proceeding was instituted, we specially notified the authorities of the Commonwealth of Pennsylvania in order that they might have ample opportunity to take such part in the hearing as they deemed desirable. A representative of the Commonwealth appeared, but withdrew from the proceeding upon the ground that we were attempting "to pass the burden and expense of doing the investigation for the Commission upon the Commonwealth." No evidence was, therefore, submitted in behalf of the Commonwealth. Later, in a letter addressed to the Commission, the representative asked that the evidence be reviewed which was presented in the case, referred to above, before the Pennsylvania court. He was informed that this evidence could not, as a matter of law, be considered unless it was presented in our own proceeding, but that the Commission would, no doubt, be willing upon request to reopen the latter for this purpose. No such request was made.

Notice of the proceeding was given widely throughout the country prior to the hearing, and the recommended report of the examiner was given like publicity. We recognize that at the hearing the only evidence was introduced by or on behalf of carriers engaged in the type of operation under investigation, and we agree without question that it is the duty of the Commission in such inquiry to see to it, so far as lies within its power, that the pertinent facts are adequately developed of record. With this end in view, we have had the record examined carefully by the technical men on our staff to determine whether or not it contains an adequate presentation of the facts. They think that it does.

While, as above indicated, we agree that the burden of obtaining an adequate record is upon us, nevertheless we feel that we have not had the cooperation in this matter from the Commonwealth of Pennsylvania which might

reasonably have been expected, and which we normally receive from State authorities, including those of Pennsylvania, with much public benefit. The Commonwealth is a sovereign State with ample resources and concerned, equally with the Federal Government, with the public welfare. If it had available evidence in regard to this matter which it believed that it was important for us to consider, we can conceive of no good reason why the Commonwealth should not have cooperated to the extent of presenting such evidence.

In all the circumstances we believe that we should issue our report in this investigation upon the record before us without further delay, arriving at the conclusions which that record warrants. We shall, however, undertake to keep informed as to the operations of the vehicles in question and their performance from the point of view of the public safety, and if it should at any time appear that there is reason to believe that our present conclusions were not justified, the proceeding will be reopened at once for further hearing.

Commissioner Lee dissents.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(Seal.)